GREENWAY CHAMBERS

RECENT WHS APPEAL DECISIONS AND OTHER MATTERS OF INTEREST

A PAPER PRESENTED AT GREENWAY CHAMBERS
WEDNESDAY, 31 MARCH 2021

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1. Three appeal judgments brought down in 2020 deal with disparate and different aspects of the practice of work, health and safety law in New South Wales.

2. They are:

   a. *Orr v Cobar Management Pty Limited* [2020] NSWCCA 220;

   b. *SafeWork NSW v BOC Limited* [2020] NSWCA 306; and

   c. *Attorney General v Jamestrong Packaging Australia Pty Limited* [2020] NSWCCA 319.

ORR V COBAR MANAGEMENT PTY LTD

Stated Cases

3. It will be recalled that His Honour Judge Scotting on 27 May 2019 brought down his reasons with regard to the prosecution of Cobar Management Pty Ltd. His Honour in bringing down his reasons stated that he was looking to acquit the defendant. The primary reason for acquittal being that the actions of the deceased worker were such as to be not foreseeable to the defendant and therefore it was not reasonably practicable for the defendant to take steps to overcome those actions.

4. Following His Honour publishing his reasons he adjourned the matter to allow the prosecutor to consider its position with regard to s5AE of the *Criminal Appeal Act 1912*. That section states as follows:

> **5AE Point of law stated during summary proceedings**
>
> (1) At any time before the completion of proceedings before the Supreme Court in its summary jurisdiction, the Land and Environment Court in its summary jurisdiction, the District Court in its summary jurisdiction or a Court of Coal Mines Regulation in its summary jurisdiction, the judge hearing the proceedings may, or if requested by the Crown must, submit any question of law arising at or in reference to the proceedings to the Court of Criminal Appeal for determination.

(2) The Court of Criminal Appeal may make any such order or give any such direction to the court concerned as it thinks fit.

5. It should be remembered that His Honour Judge Scotting had adjourned the matter prior to making any formal orders.

6. The prosecutor took up the invitation and prepared a considerable number of questions to be put to the Court of Criminal Appeal.

7. His Honour Judge Scotting did not submit the questions that were propounded by the prosecutor but instead posed seven questions himself. Those questions were:

1) Did I have the power to state the following questions of law pursuant to s5AE of the Criminal Appeal Act 1912?

2) Was it open for me to find at [254] of the Judgment, on the facts as found, that the measure pleaded in [16] of the Amended Summons was not a reasonably practicable measure?

3) Was it open for me to find at [263] of the Judgment, on the facts as found, that the measure pleaded in [17(a)] of the Amended Summons was not a reasonably practicable measure?

4) Did I fail to apply s18 of the *Work Health and Safety Act 2011* in [264] to [285] of the Judgment?

5) Was it open for me to find at [285] of the Judgment, on the facts as found, that the measure pleaded in [17(b)] of the Amended Summons was not a reasonably practicable measure?

6) Was my finding at [281] of the Judgment, relevant to determining if the measure pleaded at [17(b)] of the Amended Summons was reasonably practicable?

7) Are the findings in [301] to [306] of the Judgment relevant to determining if the failure to take the measures pleaded in [16] and [17] of the Amended Summons were a significant or substantial cause of Mr Hern being exposed to the pleaded risk.

8. The defendant argued that the Court of Criminal Appeal could not hear and determine questions proposed to it by His Honour as the matter had been completed. In support of this submission they drew the Court's attention to the fact that His Honour had brought down extensive reasons and had determined that the defendant would be acquitted. The defendant went on to argue that what was being sought to be done by the prosecutor was in effect an appeal against an acquittal and such a course of action would potentially expose the defendant to double jeopardy.

9. As the defendant was calling into question two prior Court of Criminal Appeal cases that had dealt with s5AE the Court sat with a Bench of five. The Primary Judgment was jointly delivered by Chief Justice Bathurst and President Bell with Johnson, Garling and Lonergan JJ agreeing.

10. Importantly with regard to question 1, the Court found that Scotting J was able to submit questions of law to the Court of Criminal Appeal as there had been no formal orders made, therefore such questions were submitted before the completion of proceedings as required by s5AE(1).

11. Their Honours did not, however, find that questions 2 through 7 inclusive were "questions of law". The substance of their Honours' Judgment can be found at paragraphs 108 through 111 inclusive.

> 108. In keeping with the observations of Simpson J in Goulburn Wool, the evident purpose of the procedure provided by s 5AE is to provide a facility whereby, if there is a difficult or unsettled question of law or a question of law as to which there are conflicting authorities or no clear authority, the judge hearing the matter may or, if the Crown requires, must submit such questions to the Court of Criminal Appeal.
>
> 109. Those questions of law should be, in our opinion, what are sometimes described as "pure questions of law". They should not draw the Court of Criminal Appeal into questions of fact. Moreover, they must be questions whose character as a question of law can be recognised on the face of the question, and not depend upon the answer given to the question. This does not include a question which may ultimately disclose an error of law depending on an analysis of the facts but where this cannot be known without scrutiny of the facts. The construction accords with the cases we have referred to at [48] and [70] above.
>
> 110. Further, as has been observed at [72]-[73] above, questions which take the form "Did I err in...?" are not questions of law, at least for the purposes of s 5AE (and s 5B) of the Criminal Appeal Act. Deployment of the formula "Was it open to me to find ..." in our opinion carries the same vice in the context of s 5AE of the Criminal Appeal Act.
>
> 111. In our view, none of questions 2-7 submitted to this Court by the primary judge, extracted at [26] above, were "questions of law" within the meaning of that expression in s 5AE of the Criminal Appeal Act. This Court is not empowered to answer them.

12. So at the end of the day, a party to a prosecution in the District Court may request that the Court submit any questions of law arising to the Court of Criminal Appeal. If the party requesting such a referral is the prosecutor then the Court must submit such questions.

13. The Court of Criminal Appeal, however, makes the observation that it is always a discretion open to the Court whether or not it will answer the questions posed.

SAFEWORK NSW V BOC LTD

Jurisdictional error

14. On 1 June 2020 BOC Limited was acquitted by Strathdee J of an offence of breach of ss19(2) and 32 of the *Work Health and Safety Act*.

15. Prior to making final orders the Judge on 30 April 2020 delivered her reasons and then adjourned the matter to allow the prosecutor to consider whether it would seek to have questions of law submitted to the Court of Criminal Appeal pursuant to s5AE of the *Criminal Appeal Act*.

16. The prosecutor did not seek such a submission.

17. In essence Her Honour Judge Strathdee had acquitted the defendant because she found that the workers employed by the defendant had not only failed to carry out the required testing systems when installing gas lines into the hospital but had, in fact, lied to the defendant by falsely completing forms showing that such testing systems had been undertaken.

18. Her Honour went on to conclude that it was not foreseeable for the defendant to know that employees would not only not carry out the safety systems concerned but would, in fact, lie about their actions and by so lying create a risk to the users of the hospital.

19. On 25 June 2020, the prosecutor filed a Summons in the Court of Appeal which sought to quash the final orders of Her Honour.

20. The Primary Judgment was written by His Honour Justice Basten who at [9] and [10] of the Judgment summarises the basis of the application of the prosecutor.

> 9. The applicant challenged the reasoning of the trial judge that because the testing process was supposedly "fool proof", the earlier failures to comply with safe work practices in carrying out the installation work were immaterial. Earlier in her reasons, the judge had correctly identified the question of causation as asking "whether the act or omission of the defendant was a significant or substantial cause of the exposure to the risk of injury", referring to the judgment of the Court of Criminal Appeal in Bulga Underground Operations Pty Ltd v Nash. [1] The applicant submitted that there were self-evidently two separate and independent failures to comply with safe work practices. Rejection of the materiality of the prosecution case with respect to the cutting-in process was said to be an error. Such an error in the application of the law which might have been corrected on an appeal by way of rehearing. The applicant submitted it was more than that, being sufficiently egregious to warrant characterisation as a jurisdictional error. Resisting that characterisation, the respondent submitted that the judge was under no misunderstanding as to the nature of the task to be undertaken and had neither exceeded, nor failed to engage with, her proper function.

[1] (2016) 93 NSWLR 338; [2016] NSWCCA 37 at [127] (Bathurst CJ, Hidden and Davies JJ).

> 10. Secondly, the applicant contended that dismissing the egregious behaviour of the employee (Mr Turner) as something for which the company could not be responsible was also an egregious error, and thus a jurisdictional error. It submitted that the inference that the employee had not been properly trained as to the nature, and the importance of compliance with, safe work practices in respect of laying and connecting the pipes and testing the work done, was readily available in the circumstances. Training and supervision were functions of the employer. The employee was not on a frolic of his own, but carrying out the work required, albeit in a negligent and slipshod manner. Again, it was submitted, the error in failing to find that the respondent was responsible for breaches of duty which led to the employee's non-compliance with directions was equally egregious and hence constituted jurisdictional error. It may be accepted that such an error was one which could have been corrected on an appeal by way of rehearing, but, the respondent contended, it was not an error of the kind which demonstrated any departure by the judge from the exercise of the judicial function with respect to the elements of the prosecution case, nor in failing to address submissions made on the evidence.

21. As can be seen the thrust of the prosecutor's application was that the Primary Judge had made such findings which were so egregious as to connote a finding of jurisdictional error.

22. The first question that needed to be determined by the Court is whether the supervisory jurisdiction of the Court of Appeal extended to a review of an acquittal following a summary trial.

23. This question is answered by Justice Basten at [43] of the Judgment.

> 43. The proposition that the supervisory jurisdiction of the Court extends to review an acquittal, following a summary trial by a competent tribunal, and absent fraud, cannot be maintained. That is because such a possibility runs counter to the general principle of law that a person who is prosecuted for a breach of the law, if acquitted, "is not to be a second time vexed." [2] The operation of that general principle is selected in the absence of cases involving the quashing of an acquittal by way of certiorari, and from the many cases relying on the proposition as the foundation of the requirement that any statute conferring a right of appeal in a criminal matter should not be construed as permitting an appeal by the prosecutor from an acquittal, unless such an intention is clearly and unambiguously expressed.

24. As can be seen His Honour determines that the supervisory jurisdiction of the Court of Appeal does not so extend.

25. His Honour finds earlier in the Judgment that the principle against double jeopardy is deeply ingrained and for them to be put to one side a prosecutor needs to turn to statutory rights of appeal. With regard to criminal matters dealt with summarily by the District Court of NSW, there is no statutory right of appeal available to the prosecutor against an acquittal of a defendant. The only statutory provision which may have the

[2] London Justices at 360 (Lord Coleridge CJ) quoted by Mason and Brennan JJ in *Davern v Messel* at 49.

effect of overturning an acquittal is if the Court of Criminal Appeal in answering questions of law pursuant to s5AE of the *Criminal Appeal Act* determines that there has been significant error on the part of the District Court Judge. Properly speaking that exercise is not one of appeal but rather clarification of particular and specific questions of law.

ATTORNEY GENERAL V JAMESTRONG PACKAGING AUSTRALIA PTY LTD

Amount of fine

26. The defendant in this matter entered a plea of guilty to a breach of s19(1) and s32 of the *Work Health and Safety Act.* Her Honour Judge Strathdee, following a sentencing hearing convicted the defendant and fined the defendant an amount of $100,000 less 25% for an early plea of guilty.

27. The Attorney General appealed the sentence pursuant to s5D(1) of the *Criminal Appeal Act*. The Court of Criminal Appeal was made up of Hoeben CJ at CL, Fagan J and Cavanagh J. Their Honours brought down a joint Judgment.

28. Their Honours noted the basic facts of the matter being that the defendant sought to have constructed within one of their large industrial buildings an enclosure to house a new printing machine. The ceiling of that room or structure was approximately 4 metres above the floor.

29. The defendant subcontracted the work to a company that professed skills in the construction of cold rooms.

30. Part of the construction work required large penetrations being cut into the ceiling of the room.

31. The Court notes that a SWMS had been prepared for the work, and as part of that SWMS penetrations were to be covered by plywood and marked appropriately.

32. Penetrations were cut into the roof of the room but were not covered in accordance with the SWMS, an employee of the defendant, fulfilling his work as an electrician whilst working on the roof of the room fell through a penetration and subsequently suffered fatal injuries.

33. Very unusually the Court notes at paragraph 17 the following:

> In the hearing of the appeal the respondent has continued is cooperation in the administration of justice, appropriately acknowledging from the outset that the penalty imposed by Her Honour was manifestly inadequate. This aspect of the Respondent's conduct confirms a genuineness of the remorse and acceptance of responsibility by the senior personnel of the organisation.

34. I am not aware of another example where a company has informed the Court of Criminal Appeal that the penalty awarded against it was too low and should be increased.

35. At paragraph 19 the Court finds that the penalty imposed by Her Honour was manifestly inadequate and states as follows:

> All of the company's conduct in maintaining a sound safety record before this incident and afterwards and its appropriate responses to the accident itself are as would be expected of a responsible trading corporation. The learned sentencing judge appropriately took into account the subjective circumstances referred to above and the need for general and specific deterrence. The dominant factor in determining an appropriate level of penalty is the very high order of negligence that made this infringement such an objectively serious offence of its kind. There is no specific fault in her Honour's attention to the relevant sentencing factors, including the objective seriousness of the breach, but the level of penalty arrived at is, in this Court's view, manifestly inadequate by a factor of four. A starting point fine of $400,000 would be appropriate, discounted by 25% to $300,000.

36. I note the words used by the Court relevant to the level of penalty being:

> The very high order of negligence that made this infringement such an objectively serious offence of its kind.

37. That is a phrase that I am not aware of having been used by the Court of Criminal Appeal before when describing questions of objective seriousness of breaches of s19(1) and s32 of the *Work Health and Safety Act*. The word "negligence" carrying its own meaning at law. It will be interesting to see whether this description of a relevant consideration as to penalty is adopted in other future judgments.

COSTS

38. During the year I have come across an increase in the level of argument with regard to the issue of costs being awarded at the conclusion of matters.

Indemnity costs

39. I was recently in a matter where the defendant was acquitted. The defendant then sought that its costs be paid by the prosecutor on an indemnity basis.

40. This application, which was refused by the Court, in my opinion misunderstands the nature of the costs discretion available to the District Court in the summary criminal matters.

41. The defendant in support of its application sought to bring costs in work, health and safety matters in line with the common law, particularly in line with the principles stated in *Calderbank v Calderbank*.[3]

42. The costs discretion with regard to the District Court in work, health and safety matters is not at large and is encompassed by ss257A to 257G inclusive of the *Criminal Procedure Act*. Relevantly with regard to the payment by the prosecutor to a successful defendant is s257C.

[3] [1975] 3 All ER 333.

When professional costs may be awarded to accused person

(1) A court may at the end of proceedings under this Part order that the prosecutor pay professional costs to the registrar of the court, for payment to the accused person, if the matter is dismissed or withdrawn.

(2) The amount of professional costs is to be such professional costs as the court specifies or, if the order directs, as may be determined under section 257G.

(3) Without limiting the operation of subsection (1), a court may order that the prosecutor in proceedings under this Part pay professional costs if:

(a) the accused person is discharged as to the offence the subject of the proceedings, or

(b) the matter is dismissed because the prosecutor fails to appear, or

(c) the matter is withdrawn or the proceedings are for any reason invalid.

43. As can be seen the breadth of the discretion, once the Court has decided that costs will be paid is particularly limited. Section 257C(2) provides the ability to make one of two orders.

44. Coming back to the issue of the nature of the costs order to be made, the regime set up in the *Criminal Procedure Act* does not deal with matters such as party/party or indeed indemnity costs. The costs that are the subject of an order in the District Court in the relevant circumstances are "professional costs".

45. Professional costs are defined in s257A as follows:

> **Professional costs** means costs (other than Court costs) relating to professional expenses and disbursements (including witnesses expenses) in respect of proceedings before a Court.

46. Another feature of the costs regime is the limited range of events that can lead to a prosecutor being ordered to pay costs of a defendant.

47. Noting s257D does not apply to work, health and safety matters. Section 257C(1) restricts the prosecutor paying professional costs to an accused person to a matter being dismissed or withdrawn. That is the boundary around the award of costs.

48. In addition to s257C(1) to s257(F) deals with costs incurred on adjournment, those costs may be ordered against either party.

49. There is no discrete power vested in the Court to make particular costs orders relating to discrete matters such as motions.

Environmental Protection Authority v Barnes[4]

50. The District Court is often being referred to a particular paragraph of a Judgment of Kirby J in the above matter. It is being submitted to the Court on the basis that the Court should have regard to the costs being paid by a defendant when determining the fine to be imposed on the defendant as the costs being paid form part of the punishment of the defendant. The relevant paragraph at [78] in which His Honour states the following:

> The assertion by the appellant that the penalty imposed was "a miniscule proportion of the maximum penalty" is not entirely accurate. Individual fines (which total $4,500) had, in each case, been discounted by 25% to take account of the pleas of guilty. But, more than that, the costs of $15,727.13 were an important aspect of the punishment of Mr Barnes. Quite apart from his own costs, he was required by reason of his breaches of the law, to pay slightly in excess of $20,000.

51. That paragraph needs to be read in the context of the circumstances of the matter that was before the Judge at first instance and latter before Kirby J.

52. That context was, firstly, that of a defendant who had successfully made an application to the Primary Judge pursuant to s6 of the *Fines Act* that the defendant had very limited capacity to pay a fine. Secondly, the Judge at first instance was informed that an agreement had been reached between the prosecutor and the defendant for the defendant to pay the costs of the prosecutor at a fixed amount. The orders made by the Judge at first instance reflected that agreement. Thirdly, to give effect to the provisions of s6 of the *Fines Act* the Judge at first instance and His Honour Justice Kirby were required to determine a level of fine that would take into account the defendant's proven incapacity to pay.

53. In coming to the conclusion as to the level of fine, in those circumstances, the Court took into account, when looking at the level of incapacity of the defendant, the fact that the defendant had an obligation to pay the costs of the prosecutor.

54. The case therefore, and His Honour's statement at paragraph 78 of his Judgment, relate particularly to the operation of s6 of the *Fines Act* and the consequential decisions that have to be made by the Court following on from a successful application to the *Fines Act*. It is not a statement of generality.

55. If it were a statement of generality it would fly in the face of the High Court Judgment in *Latoudis v Casey*,[5] and the statements within that Judgment made by both Mason CJ and Justice McHugh.

56. Mason CJ at page 543 states in part:

> If one thing is clear in the realm of costs, it is that in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense they are awarded

[4] [2006] NSWCCA 246.
[5] (1990) 170 CLR 534.

> to indemnify the successful party against the expenses to which he or she has been put by reason of the legal proceedings.

57. And His Honour Justice McHugh at 567 states in part:

> Once it is perceived that costs operate as an indemnity and that the rationale of making a costs order is that it is just and reasonable that the successful party should be reimbursed for the costs incurred in bringing or defending the action, no ground exists for distinguishing between informants in summary proceedings via public officials and those who are private persons.

58. Very relevantly to work, health and safety prosecutions His Honour Justice Basten in *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for NSW v Silver City Drilling (NSW) Pty Ltd*,[6] extracts the Judgment of Justice McHugh in *Latoudis v Casey* in paragraph 68 and gives effect to them at paragraph 70.

59. The authorities make plain that the purpose of a costs order is distinct from punishment of a convicted defendant. Costs are ordered with the purpose of indemnifying the successful party, and for no other reason.

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GREENWAY CHAMBERS

31 MARCH 2021

[6] [2017] NSWCCA 96.